

May 24, 2002

VIA Courier

John F. Morrall III
Office of Information and Regulatory Affairs
Office of Management and Budget
NEOB, Room 10235
725 17th Street, NW
Washington, DC 20503

RE: Notice and Request for Comments;
Draft Report to Congress on Costs and Benefits of Regulations

Dear Mr. Monall:

The American Petroleum Institute (API) appreciates the opportunity to submit comments to the Office of Management and Budget (OMB) in response to its March 28, 2002 request for comments on the Draft Report to Congress on the Costs and Benefits of Federal Regulations ("Draft Report to Congress") [67 *Federal Register* 15013-15045]. API represents more than 400 member companies involved in all aspects of the oil and gas industry. Our member companies are subject to a wide range of federal regulations, and we have been stakeholders and active participants in many rulemaking efforts. We welcome the opportunity to provide OMB with information on the burden and benefits of some of the major regulations issued by federal agencies.

Chapter IV of the Draft Report to Congress solicits comments on regulations or regulatory programs in need of reform, and invites review of agency practice regarding guidance documents. In response, API suggests the following as candidates for regulatory reform and review of guidance practice in the area of community right-to-know regulation:

- Lowering of Toxics Release Inventory (TRI) reporting thresholds for persistent, bioaccumulative, and toxic (PBT) chemicals (regulation); and
- Development and use of guidance documents in the TRI program (guidance).

Each of these candidates is discussed in a separate attachment, using OMB's requested format for suggestions. API believes that these are prime opportunities for increasing net benefits, by reforming the regulations and guidance to reduce cost and paperwork, without sacrificing any benefits to the public interest.

Letter to Mr. Morrall

May 24, 2002

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Please note that last year, in response to OMB's May 2, 2001 request for comments on the Draft Report to Congress on the Costs and Benefits of Federal Regulations [66 *Federal Register* 220411, API submitted four suggestions for reform—two in the Toxic Substance Control Act (TSCA) area and two related to the Toxics Release Inventory (TRI)). In the OMB report *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities*, OMB identified 71 suggestions for regulatory reform that OMB received from the public. The report included our two suggestions in the TSCA area, but did not mention our two suggestions in the TRI area. Consequently, we are resubmitting our TRI suggestions at this time.

API appreciates the opportunity to provide input into the OMB review process. Please feel free to contact Glen Barrett (202-682-8341; barrettg@api.org) of my staff with any questions you may have regarding these suggested regulatory and guidance reforms.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard J. Feldman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Howard Feldman

Director

Regulatory Analysis and Scientific Affairs

Enclosure

cc: Lorraine Twerdok, API
Glen Barrett, API
RTK/EI Task Force

**AMERICAN PETROLEUM INSTITUTE
SUGGESTED REGULATORY REFORM**

**Emergency Planning and Community Right-to-Know Act (EPCRA)
Toxics Release Inventory (TRI) Guidance**

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**AMERICAN PETROLEUM INSTITUTE
SUGGESTED REGULATORY REFORM**

**Emergency Planning and Community Right-to-Know Act (EPCRA)
Toxics Release Inventory (TRI) Guidance**

I. Summary

A. Name of Regulation

Toxics Release Inventory (TRI) Reporting Requirements
("Toxic Chemical Release Reporting: Community Right-to-Know")

B. Agency Regulating

Environmental Protection Agency

C. Citation

40 CFR Part 372

D. Authority

Emergency Planning and Community Right-to-Know Act Section 313
42 U.S.C. 11001 et. seq.

E. Description of Problem

Emergency Planning and Community Right-to-Know Act (EPCRA) Section 313 requires owners/operators of subject facilities to submit annual reports on the amounts of listed "toxic chemicals" released into the environment or transferred to other facilities.] The list of toxic chemicals includes over 600 chemicals and chemical categories. Data submitted by companies on EPA's "Form R" or "Form A" comprise EPA's TRI database, which is widely accessed by the public through the Internet and other sources, and is used by EPA for many purposes including the support of many rulemakings. Since EPCRA was enacted in 1986, EPA has continually and substantially expanded the TRI program. In addition to major notice and comment rulemaking expansions, EPA has changed the TRI program through the issuance of "guidance," particularly in the question and answer ("Q&A") format. EPA has issued many guidance documents for the core program, plus multiple additional guidance documents to support each program change (e.g., adding industry sectors, lowering thresholds for selected chemicals).

¹ Subject facilities are those in specified SIC codes and that have 10 or more full-time equivalents.

The extensive use of guidance documents in the TRI program imposes an additional layer of requirements on the regulated community, which increases the burden of the program. The burden is not accounted for in current cost analyses. Furthermore, the quality and consistency of TRI data are being eroded, because the rules for reporting are constantly changing. This decreases the benefits of the program to the public and to the government. When TRI data are reported to the public, EPA usually acknowledges inconsistencies caused by major program changes (such as TRI list additions and industry sector expansion), but the Agency generally does not acknowledge the effects of changes in guidance.

In the area of TRI guidance, there are four major issues or “problems” that raise the burden of compliance without increasing the benefits of the program:

- use of guidance to change TRI requirements;
- flawed process for issuing and revising guidance;
- insufficient consideration of issues in rulemaking, thus leaving too many issues to be addressed in guidance; and
- poor quality guidance.

Each of these major issues is discussed in Section II below.

F. Proposed Solution

Possible solutions are summarized in the table below.

Issue	Recommendations
Use of guidance to change TRI requirements	<ul style="list-style-type: none"> • Minimize changes to existing guidance documents. Even changes described as “minor edits” make it necessary for the regulated community to review, assess, and apply the changes. • Make no changes to guidance documents that have the potential to expand reporting requirements. Instead, use the notice and comment process for any such changes.
Flawed process for issuing and revising guidance	<ul style="list-style-type: none"> • Set a regular schedule for issuing any revised or new TRI guidance documents. Allow sufficient time for review and comment, and for issuing the final guidance document well in advance of the reporting deadline for which it will apply (at least before the end of the reporting year). • Clearly date all guidance documents. Consider any change to a document to constitute issuance of a revision, and give notice in

	<p>the <i>Federal Register</i>.</p> <ul style="list-style-type: none"> Do not instruct or expect companies to rely on drafts, particularly when drafts are undergoing review and comment.
Insufficient consideration of issues in rulemaking; leaving too many issues to be addressed in guidance	<ul style="list-style-type: none"> For any upcoming cost and benefit analyses, including review of information collection requests (ICRs), include costs and benefits associated with guidance. In future rulemakings, explore fully and take comment on implementation, including effects of guidance. If a guidance document will be necessary to implement a rulemaking, the document should be published and open for comment simultaneous to the proposed rulemaking. Address the cumulative impact of program changes and guidance when conducting cost and benefit analyses.
Poor quality guidance	<ul style="list-style-type: none"> Establish data quality criteria for data used in guidance documents (e.g., concentration data, emissions factors, and other information). Only data that meet the quality criteria should be included in guidance documents. Ensure that all data and information in guidance documents are properly attributed (i.e., original source clearly noted).

G. Estimate of Economic Impacts

There are no currently available estimates of the burden and benefits of TRI guidance. This is one of key problems of “regulation by guidance.” Guidance documents are not subject to the same level of scrutiny and analysis as is afforded during the notice and comment rulemaking process. We recommend that EPA and/or OMB include the full costs associated with guidance when assessing costs of TRI and other regulations. Information presented in the discussion below may be helpful in identifying some of the burden associated with guidance documents, which could then be quantified.

II. Discussion

A. Background

EPA's web site for TRI guidance currently contains links to 28 separate EPA guidance documents. These documents are provided in addition to the TRI "Form R" and its instructions, which are over 100 pages long. The extensive use of guidance in the TRI program has the effect of imposing an additional layer of requirements on the regulated community. Although EPA states that the purpose of guidance is "to help clarify the reporting requirements," its impacts go far beyond clarification. EPA relies on guidance to implement and enforce the program, and instructs companies to use the guidance documents for reporting.

The proliferation of guidance needs to be viewed in the larger context of the continually changing TRI program. EPA has issued guidance to support the core program, plus multiple additional guidance documents to support each program change. Major expansions of TRI in recent years have included:

- The 1994 addition of 286 chemicals and chemical categories to the TRI list, which nearly doubled the number of substances subject to reporting.
- The 1997 addition of seven industry groups to the list of facilities subject to reporting requirements, which resulted in the submission of over 15,000 additional TRI forms from facilities in those seven industry groups in 1998 (the first year they were subject to reporting).
- The 1999 "PBT" expansion that added seven chemicals and two chemical categories to the TRI list, lowered TRI reporting thresholds dramatically for 15 chemicals and three chemical categories, and eliminated the *de minimis* exemption for designated PBT chemicals. EPA estimates that in the first reporting year for which these changes are in effect, over 11,000 facilities will be affected and almost 20,000 additional reports will be submitted.
- The 2001 rule that lowered reporting thresholds for lead, which EPA estimates will affect 9,800 facilities.

The combination of major program changes made by regulation and the proliferation of TRI program changes through guidance, has resulted in the problem of increased burden. Even the courts have recognized that proliferation of guidance and other material outside the rulemaking process can constitute improper lawmaking.² EPA and OMB should address the cumulative burden of regulatory changes and proliferating guidance.

² See *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000).

B. Use of Guidance to Change TRI Requirements

Although the purpose of its guidance is to clarify reporting requirements, EPA's guidance in the TRI program has expanded the reporting requirements. When EPA changes guidance in a manner that results in more expansive reporting than previously required (e.g., when exemptions are narrowed, or when applicability definitions are made more inclusive), then the Agency effectively increases requirements outside the normal and appropriate notice and comment rulemaking process for making such changes.

Numerous examples can be found by reviewing EPA's 300-page "EPCRA Section 313 Questions and Answers" document, last revised in **1998 ("1998Q&A")**. This document replaced and significantly revised a **1997 Q&A** document. Although EPA published a notice of availability in the *Federal Register* for the **1998 Q&A** document³, the Agency did not take comments on the extensive revisions. Between the **1997** and **1998** versions of the Q&A document, EPA changed more than 400 Q&As from the **1997** document and added 150 new Q&As.

Although EPA presented many of the changes that appeared in the **1998 Q&A** as "minor," the regulated community still had to review and assess all changes, and make sure they were incorporated in compliance systems and practices. Indeed, EPA stated in the notice of availability, "Facilities covered by EPCRA Section 313 should review the entire updated document to understand compliance with the regulations."⁴

EPA mentioned in the notice of availability some of the significant changes to TRI requirements that appeared in the **1998 Q&A** document. These changes included but were not limited to the following:

- The **1998 Q&A** narrowed the motor vehicle exemption (40 CFR 372.38(c)(4)). EPA had previously stated that, in the case of vehicles owned by a single company driven to one site to be refueled, the gasoline stored and used by the refueling facility would be exempt under the motor vehicles exemption (**1997Q&A #189**). The **1998 Q&A** reversed this, stating that the refueling facility is *processing* the gasoline, and must count chemicals in the gasoline toward the processing threshold (**1998Q&A #287**).
- The **1998 Q&A** states that ammonia present in human waste (sewage) is *manufactured* as a result of waste decomposition and that "the facility should report that it has manufactured ammonia as a byproduct" (**1998Q&A #246**). EPA had previously, and more appropriately, stated that ammonia present in sewage from employees working at the plant was exempt (**1997Q&A #161**).

³ 64 FR 32232-32234, June 16, 1999.

⁴ 64 FR 32233.

- The 1998 Q&A states that metal scraps sent off-site (to be remelted and reused) are repackaged and distributed, and that chemicals in the metal scraps must be counted toward the facility's processing threshold (1998 Q&A, #588). This interpretation was not present in the corresponding 1997 Q&A (#435).

In addition to the examples above, which were among those mentioned in EPA's notice, API identified other significant changes made in the 1998 Q&A that EPA did *not* highlight in its notice. These included the following:

- In the 1998 Q&A, EPA addressed an example of a petroleum bulk plant receiving petroleum via pipeline. In the example, the petroleum is piped into a storage tank and exits the facility again through the same pipeline. EPA declared this to be "repackaging" that must be considered toward the facility's processing threshold (1998 Q&A #164). This interpretation was not present in the 1997 Q&A document; it first appeared in an "addendum" EPA generated when preparing guidance for newly reporting industries.
- EPA added a sentence to the 1998 Q&A that effectively expanded TRI requirements to cover some chemicals in motor vehicle exhaust. The 1998 Q&A (#285) included a statement, not in the corresponding 1997 Q&A (#188) that declared "the manufacture of combustion products from motor vehicles" to be a non-exempt activity, when it had previously been considered an exempt activity. This statement is in direct conflict with an earlier EPA Q&A that clearly stated that vehicle exhaust emissions should not be counted toward threshold determinations and release estimations, under the motor vehicle maintenance exemption.⁵ EPA's earlier position was that the release or coincidental manufacture of toxic chemicals from an activity that meets an exemption is exempt. Furthermore, although the Q&A changed significantly from 1997 to 1998, EPA's "crosswalk" between the 1997 and 1998 Q&A documents identified the changes to this Q&A as "minor" and said that the changes had no substantive effects.
- In the 1998 Q&A, EPA indicated that all hours worked by employees that do not physically work on-site (e.g., persons who work at customer sites, at home, and traveling sales representatives) must be counted toward the 20,000-hour employee threshold (1998 Q&A #31 and #33). The 1997 Q&A did not indicate such employees should be counted.

These are just selected examples of changing TRI reporting rules via guidance. Substantive changes like these, in combination with the hundreds of "minor" changes that EPA makes to its guidance documents, essentially create a "moving target" for the many thousands of facilities that are subject to TRI reporting requirements.

⁵ EPA, "Compliance with EPCRA of 1986 as Required under Executive Order 12856," March 17, 1995, #83.

C. *Process for Issuing Guidance*

EPA's process for issuing guidance has often resulted in confusion and additional burden on the regulated community. The following are selected examples of problems with the process used to issue guidance in the TRI program:

- When EPA issued its 1998 overhaul of the TRI "Q&A" guidance and six new industry guidance documents, it announced the availability of the documents in a *Federal Register* notice published on June 16, 1999 (64 FR 32232-32234). This was two weeks before TRI reports for the 1998 reporting year were due, when facilities would have already completed most or all of the work necessary for 1998 reporting. The notice stated that the documents were effective beginning with the 1999 reporting year. However, EPA also stated, "to ensure consistency in reporting and the integrity of the data, the Agency would prefer that covered facilities use these documents as guidance for the 1998 reporting year as well." In addition, at that time, the previous versions of guidance documents were no longer available from EPA. Both EPA's web site and the EPCRA Hotline would provide only the revised 1998 Q&A.
- When EPA issued its first guidance document for petroleum bulk storage facilities, it posted the document on the Internet, and then repeatedly changed the document without any notice or indication of revisions. API members who downloaded the document in October 1997 and again in August 1998 noticed significant changes in the document.⁶ However, both versions were dated September 15, 1997, and no changes were highlighted. No *Federal Register* notice of the changes or opportunity for comment accompanied the changes.
- EPA promulgated changes to TRI reporting for PBT chemicals in October, 1999, with the changes effective for the 2000 reporting year. As discussed in section D below, EPA did not address many issues raised in the proposed rule, but instead chose to address them in guidance. However, the Agency still has not issued final guidance for any of the PBTs except dioxins. In November 2000 and March 2001, EPA issued *draft* guidance documents for mercury and mercury compounds, polycyclic aromatic compounds, pesticides and other PBT chemicals. API and other commenters found numerous problems with the draft documents, although there were significant improvements from the Fall to Spring drafts.⁷ As of this writing, the deadline for submitting forms for 2000 reporting is approximately less than a month away, and EPA still has not issued final guidance for reporting PBTs. This creates a burdensome situation for the regulated community. Facilities begin collecting and analyzing data

⁶ API reported the observed changes in a letter to EPA. Letter to Dr. Maria Doa, OPPT from Paul Bailey, API, August 28, 1998.

⁷ Comments of the American Petroleum Institute, Guidance Documents for Mercury and Mercury Compounds, Polycyclic Aromatic Compounds, and Pesticides and Other Persistent Bioaccumulative Toxic (PBT) Chemicals, December 28, 2000.

far in advance of the July reporting deadline. Key activities to track releases and collect data occur during the year for which reporting is required (in this case, 2000). Companies should not be expected to rely on fluctuating draft guidance or proceed with no guidance at all. Although API commends EPA for issuing notice of and taking comments on the draft guidance documents for PBTs, the guidance development process needs improvement, particularly in the areas of timeliness and sufficient opportunity for comment.

D. *Insufficient Consideration of Issues in Rulemaking*

In recent years, EPA has rushed to issue TRI rulemakings and left significant issues to be addressed in guidance. This is most notable in the recent PBT rulemaking, which lowered reporting thresholds and eliminated the *de minimis* exemption for a number of chemicals.⁸ In comments on the rulemaking, API and others raised pertinent issues including the following:

- absence of information about *de minimis* quantities of chemicals in mixtures, and what assumptions facilities would be expected to make in the face of this absence of information;
- technical and economic feasibility of accounting for trace amounts of PBTs in complex variable composition mixtures such as petroleum streams;
- setting dioxin thresholds below practical ability to measure;
- how to segregate background levels from amounts "manufactured" (particularly significant for dioxins); and
- what assumptions facilities would be expected to make regarding chemicals potentially present in trace amounts in fuels.

Avoiding these issues in the rulemaking process, EPA issued a final rule and then drafted guidance documents, which still have not been finalized even though activities for reporting year 2000 are virtually complete. EPA did not gather any new information between the time it finalized the PBT rule and the time it issued the first draft guidance. The draft guidance should have been issued along with the proposed rule, so that interested parties could comment on the proposed rule with full understanding of how EPA intended to implement it. In this case, there was no apparent valid reason to wait to issue draft guidance until after the final rule was published.

⁸ See API's separate paper, submitted concurrently with this one, on the lowering of reporting thresholds for PBT chemicals.

E. Guidance Quality

Any guidance documents issued by EPA should meet high standards for quality and use only recent, validated information. This is increasingly important with the elimination of the *de minimis* exemption for some chemicals, because many facilities will use the guidance due to lack of information about chemicals potentially present at low levels in mixtures. Errors in guidance information (e.g., chemical concentrations, emissions factors, assumptions that chemicals are present) are multiplied many times over if used in threshold calculations and release estimates. Such errors have the potential to seriously erode the quality and usefulness of the TRI database.

In reviewing the first draft of the most recent guidance documents EPA issued (for the PBT rule), API found several major problems with the documents.⁹ These included inadequate citations for sources of information, use of data from old data sources even where more recent data were available, and the total lack of any data quality criteria (i.e., minimum standards for data to be used in the guidance). It is essential that EPA not use guidance documents to create its own "published values" by using any available numbers, without regard to data quality or substantiation. If EPA guides companies to use concentration or emissions assumptions that are inaccurate or invalid, the result will be inaccurate and misleading release reports and further corrosion of the value of TRI data.

F. Opportunities for Reform

Reforming processes for issuing guidance in the TRI program would reduce the burden on the regulated community, without sacrificing any protection of human health and the environment. API lists specific suggestions for changes in section I.F of this document. None of these reforms would require statutory or regulatory changes.

⁹ These problems were noted and explained in the comments API submitted to EPA.

**AMERICAN PETROLEUM INSTITUTE
SUGGESTED REGULATORY REFORM**

**Toxics Release Inventory (TRI)
Lower Reporting Thresholds for Persistent, Bioaccumulative, Toxic Chemicals**

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**AMERICAN PETROLEUM INSTITUTE
SUGGESTED REGULATORY REFORM**

**Toxics Release Inventory (TRI)
Lower Reporting Thresholds for Persistent, Bioaccumulative, Toxic Chemicals**

I. Summary

A. Name of Regulation

Toxic Chemical Release Reporting; Community Right-to-Know; Lower Thresholds for Chemicals of Special Concern

B. Agency Regulating

Environmental Protection Agency

C. Citation

40 CFR Part 372.28

D. Authority

Emergency Planning and Community Right-to-Know Act Section 313
42 U.S.C. 11023 and 11048

E. Description of Problem

A 1999 final rule for persistent, bioaccumulative, toxic (PBT) chemicals (“PBT rule”) dramatically lowered Toxics Release Inventory (TRI) reporting thresholds for 15 chemicals and three chemical categories. The PBT rule also eliminated the *de minimis* exemption for designated PBT chemicals and changed other rules for reporting. Problems posed by the modified rules for PBT chemicals include the following:

- The separate reporting thresholds and rules for PBT chemicals impose a high level of burden on the regulated community (see section G below). However, EPA provided no quantified estimates of the benefits of the rule. The Agency stated that it did not even attempt to quantify benefits “because the state of knowledge about the economics of information is not highly developed.”
 - The petroleum bulk plants and terminals sector (SIC 5171) is expected to be disproportionately affected by the rule. According to EPA’s *Economic*

¹ 64 FR 58742, October 29, 1999.

Analysis,² the facilities affected in this sector, a high percentage of which are small businesses, represent 15 percent of all facilities affected by the rule.

- The changes have the potential to undermine the TRI program because they introduce additional distortions and inconsistencies into the TRI database. The lower thresholds effectively label PBTs as higher risk than other TRI chemicals, in the absence of any analysis of relative risk. After assigning a small group of chemicals reporting thresholds that are two to three orders of magnitude lower than the reporting thresholds for other chemicals and eliminating exemptions (e.g., *de minimis* exemption) for them, the release data for PBT chemicals will be misleadingly high relative to releases of other chemicals and to previous years' releases.
- The elimination of the *de minimis* exemption (only for PBT chemicals) creates an unnecessary burden for the regulated community, and has particular potential to distort TRI data.

Each of these major issues is discussed in Section II below

During the PBT rulemaking, API and other commenters raised a number of policy, legal, and scientific issues that warrant reconsideration. EPA issued the lengthy final rule approximately six months after the close of the public comment period—a relatively short time for consideration of the multiple issues raised by commenters. Important issues regarding implementation were not addressed in the final rule, but deferred to be addressed in guidance.³

F. Proposed Solution

Possible solutions include the following:

- Promulgate an exemption from the special rules for PBTs for petroleum bulk plants and terminals (SIC 5171). In the final rule, EPA stated that it was considering an exemption for petroleum bulk plants and terminals and solicited comments on the issue. As far as we know, the Agency has not yet issued a decision regarding the possible exemption.
- Reinstate the *de minimis* exemption for PBT chemicals. The *de minimis* exemption is currently in place for all other TRI chemicals and should be available for all TRI chemicals including those designated as PBTs. The *de*

² EPA, *Economic Analysis of the Final Rule to Modify Reporting of Persistent Bioaccumulative Toxic Chemicals Under EPCRA Section 313*, October 1999.

³ See API's separate paper, submitted concurrently with this one, on the use of guidance in the TRI program.

minimis exemption is necessary for practical implementation of the reporting requirements and for promoting data quality.

- API recommends that EPA and OMB reconsider the PBT rule, and consider restoring consistent rules for all TRI chemicals (returning thresholds to their previous levels and reinstating exemptions). After data are received for the 2000 reporting year, EPA will have the opportunity to assess the value of the additional information collected under the lower reporting thresholds. EPA should then be able to quantify benefits and compare them with the costs of the rule. API and others believe that, under the new reporting thresholds, EPA will receive a large number of “zero reports” (i.e., Form Rs that are filed because a low reporting threshold is met, but that report no releases of the chemical). Zero reports are of minimal value and provide an indicator that reporting thresholds are too low.

G. Estimate of Economic Impacts

EPA estimates that it will receive approximately 20,000 additional Form R reports annually due to lower reporting thresholds for PBTs. EPA’s Economic Analysis for the rule estimated total costs to industry to be \$145 million in the first year and \$80 million per year in subsequent years. Government (EPA) expenditures necessary to implement the rule are estimated at \$2 million in the first year and \$1.6 million in subsequent years. EPA has provided no quantified estimates of the benefits of the rule.

II. Discussion

A. Background

On October 29, 1999, the U.S. Environmental Protection Agency (EPA) published a final rule containing substantial changes to Toxics Release Inventory (TRI) reporting requirements for certain chemicals the Agency designated as persistent, bioaccumulative, toxic (PBT) chemicals (“PBT rule”). The rule dramatically lowered TRI reporting thresholds for 15 chemicals and three chemical categories. Reporting thresholds are either 10 or 100 pounds for chemicals/categories manufactured, imported, processed or otherwise used — instead of the previous 25,000 pounds for chemicals/categories manufactured, imported, or processed, and 10,000 pounds for chemicals otherwise used. The newly added category for “dioxin and dioxin-like compounds” has a reporting threshold of 0.1 grams. The PBT rule also eliminated the *de minimis* exemption for designated PBT chemicals. The new reporting thresholds take effect for the 2000 reporting year, for which reports are due July 1, 2001. The PBT rule was followed with a January 17, 2001 final rule that lowered reporting thresholds for lead and lead compounds to 100 pounds.

B. Burden on the Regulated Community

As summarized in section I.G, EPA estimates that the PBT rule will cost the regulated community \$145 million in the first year and \$80 million per year in subsequent years, yet EPA has provided no quantified estimates of the benefits of the rule. API is particularly concerned about high costs and low benefits associated with the impacts of the rule on the petroleum bulk plants and terminals sector (SIC 5171).

In the October 29, 1999 final rule, EPA stated that it was considering an exemption for petroleum bulk plants and terminals (SIC 5171), and solicited comments on the issue.⁴ An exemption is warranted for this sector because:

- the information collected will be of limited practical utility;
- facilities in SIC 5171 are not significant sources of PBT releases; and
- an exemption will mitigate expected large costs on small businesses.

API expects that a significant number of the reports to be filed by this sector will be zero reports, which represent no real information and are of minimal utility. Zero reports can result when a facility has no data indicating that a chemical is present or released, but exceeds the reporting threshold when assumptions (usually from EPA guidance) are applied to fuel throughputs to calculate amounts of PBTs chemicals manufactured, processed, and otherwise used.

Currently available information indicates that facilities with primary SIC code 5171 are not significant sources of PBT releases. In summary:

- **Mercury.** API members reviewed available data and found no indications of mercury in terminal discharge water, air releases, or onsite land releases. The only indication of mercury-containing waste disposal was for tank cleaning, which occurs infrequently. Furthermore, EPA's comprehensive *Mercury Study Report to Congress* did not identify releases from petroleum terminals as a source of mercury releases.⁵
- **PACs.** EPA's summary of its 1990 air emissions inventory for PACs lists total emissions of approximately 427,000 tons per year, but none of these emissions are identified as coming from petroleum terminals.⁶

⁴ 64 FR 58672.

⁵ EPA, *Mercury Study Report to Congress*, Volume II, Office of Air Quality Planning and Standards and Office of Research and Development, 1997. See summary table in the *Economic Analysis*, pages D-2 to D-3.

⁶ *Economic Analysis*, page H-3.

- **Dioxins.** Neither EPA's *Integrated Summary and Risk Characterization for 2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) and Related Compounds* nor the draft TRI guidance document for dioxins and dioxin-like compounds identifies facilities in SIC 5171 as potential sources of dioxin releases.⁷
- **PCBs.** EPA's 1990 National Emissions Inventory estimated air emissions of approximately 315 pounds per year of PCBs, almost all of which was estimated to be from waste incineration. No air emissions of PCBs were attributed to petroleum bulk terminals.⁸

Although petroleum plants and bulk terminals are not expected to be significant sources of PBT releases, they are expected to bear high costs as a result of the rule. The table below summarizes information from EPA's final *Economic Analysis*. Facilities in SIC 5171, particularly small businesses, will be subject to significant and disproportionate burden. Note that of all facilities in SIC 5171 estimated to be affected by the rule, 1214 out of 1705 facilities — ver 70 percent — are small businesses.

Disproportionate Burden on SIC 5171			
All facilities (large and small)			
	Total (All Sectors)	SIC 5171	SIC 5171 Impacts as Percentage of Total
Facilities Affected	11,257	1,705	15%
Reports Expected	19,990	3,489	17%
Estimated 1st Year Costs	\$ 145 million	\$ 18.4 million	13%
Small Businesses			
	Total (All Sectors)	SIC 5171	SIC 5171 Impacts as Percentage of Total
Small Businesses Affected	4,393	1,214	28%

C. Impacts on TRI Database

The PBT rule has the potential to have negative effects on the integrity of the TRI database and thus erode benefits to the public of the TRI. API supports efforts to improve the TRI, particularly activities to improve data quality and usefulness, foster meaningful communication, and provide a reliable and stable measure of progress over time. The PBT rule designates reporting thresholds for a small group of chemicals that are two to three orders of magnitude lower than the reporting thresholds in effect for all of the other TRI chemicals. EPA states that the TRI “provides a neutral yardstick by which progress can be measured by all

⁷ Notices of availability at 65 *FR* 36898-36900, June 12, 2000 and 65 *FR* 37548-37549, June 15, 2000.

⁸ *Economic Analysis*, page 1-5.

interested parties.”” Special rules for a small group of chemicals, chosen without the benefit of any relative risk analysis, is not neutral and weakens the TRI system in terms of providing a useful metric.

The lower thresholds for PBTs will introduce distortions and inconsistencies into TRI data. Release numbers for PBTs will not be comparable to those for other chemicals with higher reporting thresholds, and there will be no valid way to compare PBT releases with data from previous years. Lowered reporting thresholds (along with elimination of the *de minimis* exemption) may give the appearance that releases are rising or that a new chemical has been introduced at a facility, when this may not be the case in reality.

D. *De Minimis* Exemption

API and other commenters strongly opposed EPA’s elimination of the *de minimis* exemption for chemicals designated as PBT. We recommend that the *de minimis* exemption be in effect for all TRI chemicals, as it was before promulgation of the PBT rule.

For practical implementation of TRI reporting, it is essential that TRI reporting threshold rules be consistent with Occupational Safety and Health Administration (OSHA) Hazard Communication Standard (HCS) levels of chemicals that are reportable on material safety data sheets (MSDSs). MSDSs are the primary source of information about chemical content for the mixtures that facilities process and use, and only chemicals present above *de minimis* levels are required to be listed on MSDSs.

API is particularly concerned about the effect of eliminating the *de minimis* exemption for complex variable composition mixtures, such as those commonly manufactured, processed, and used in the petroleum industry. For these mixtures, attempting to identify and quantify quantities below *de minimis* levels is impractical and extremely burdensome, and does not produce meaningful data for public use. The various constituents found in such mixtures at less than one percent are present in very low concentrations that fluctuate over time due to variations in the naturally occurring crude oil feedstocks run through the refinery. In some cases, a constituent may be present at very low levels at certain times, but completely absent at others.

The failure to address the technical and economic feasibility of accounting for trace amounts of PBTs in complex variable composition mixtures like petroleum streams is a major flaw in the PBT rule. API recommends reinstating the *de minimis* exemption to remedy the burdensome situation in which manufacturers, processors, and users are forced to attempt to track very small quantities that vary

⁹ 64 FR 690, column 2.

over time. The exemption is also necessary in order to ensure data quality, because available measurement and estimation methods will not always provide accurate results for low-level constituents in variable composition mixtures.

E. Opportunities for Reform

API lists specific suggestions for changes in section I.F of this document. These reforms would require amending TRI regulations. No statutory changes would be necessary. On the contrary, the PBT rule appears to exceed EPCRA statutory mandate.¹⁰

¹⁰ For further discussion, see *AFT, Comments of the American Petroleum Institute: Persistent Bioaccumulative Toxic (PBT) Chemicals Proposed Rule*, April 5, 1999.